APPELLATE JURISDICTION

Lord Coke gave us a phrase that is worth remembering in these days of innumerable reports: *Melius est petere fontes quam sectari rivulos.* It is better to seek the fountains of truth than to meander along the brooks that flow from them. Let us therefore consider the origin, and see what we can find to enlighten the present.

In the Roman law, the appeal took up the whole cause. When we read in the Book of Acts that St. Paul appealed to Cæsar it did not mean that the Emperor's court at Rome would examine whether Judge Felix had committed reversible error, but that the whole cause should be "reserved for the hearing of Augustus." The Centurion who took the Apostle to Rome, acted under what the old lawyers called "*habeas corpus cum causa.*"

The English Courts of equity and admiralty adopted this practice from the civil law. The Federal Courts in this country sitting in admiralty or in equity, and all state courts which have a separate equity jurisprudence still preserve it. At common law the appellate practice was originally the same, though the methods were different. Stephen lays it down in his great book on Pleading (page 119):

> "It is, however, a principle necessary to be understood in order to have a right apprehension of the nature of writs of error, that judges are in contemplation of law bound, before in any case they give judgment, to examine the whole record, and then to judge either for the plaintiff or defendant according to the legal right as it may on the whole appear."

Originally at common law under the system of special pleading which prevailed, the controversy of fact between the parties was narrowed by the pleadings to a single material issue. The verdict of the jury determined this. That became a part of the record, and then the court in banc determined what judgment should be rendered upon the pleadings, and the findings of the jury upon the issue of fact. The evidence on the trial did not become a part of the record. When the facts were complicated so that the true nature of them did not sufficiently appear from the pleadings, a special verdict was found. This was analogous to the special findings of a trial judge or referee under our system. It became a part of the record, and the court then rendered judgment upon

it, and any court of error examined the whole record and gave final judgment thereon according to its view of the law as applicable to the facts appearing on the record. The introduction of the plea of the general issue deprived the appellate court of the information which before had been furnished by the pleadings in the case, and by the verdict on the single issue which they had raised. Accordingly it became the practice when a case was to be reviewed before the full bench, that the trial judge should report the facts. Provision had also been made for a bill of exceptions which should enable any rulings of the trial court to be presented to the appellate court. When this new system was introduced, the question at once arose as to how the appellate court should deal with the bill of exceptions, and with the record of which it formed a part. The rule originally adopted is thus stated by Stephen (page 121):

"With respect to the writ of error of this latter description it is further to be observed that it cannot be supported unless the error in law be of a substantial kind."

Accordingly the appellate courts for a time still continued to give judgment upon the merits. But at a later period the English Court of Exchequer adopted the rule that any mistake of the trial court must be presumed to have worked injury. This rule is stated and illustrated in Section 21 of Wigmore on Evidence. In Section 9 the same author expresses the manner in which this rule has been administered in the following forcible language:

"The most trifling error 'works a reversal' in the same wizard-like manner that the mispronounced word in the superstitious formulas of the Germanic litigation lost for the party his cause. The modern doctrine is the more discreditable of the two. They knew no better then. We do know better, yet we preserve this technical trumpery."

So far have the courts gone in this respect that exceptions are now permitted to the use of language by counsel which the opposite counsel conceives to be unfair, and judgments have actually been reversed, not because the cause was not rightly decided in the court below, but because one of the lawyers overstepped what the appellate court considered the limit of fair argument.[1]

In short the trial of a case under this system has become a game, and if one of the lawyers violates the rule of the game it must be played over again.

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[1] Union Pacific R. R. Co. *v* Field (1905) 137 Fed. 14.

When David Dudley Field drafted a Code of Practice for this state he drafted sections which the Legislature enacted, in the Code of Procedure, as follows:

"Section 323. Writs of error in civil causes as they have hitherto existed are abolished, and the only method of reviewing the judgment or order in a civil action shall be that prescribed by this title."

"Section 325. Any party aggrieved may appeal in the cases prescribed in this title."

The original Code took effect on the first day of July, 1848. It was undoubtedly Field's intention to give to the appellate courts which were provided in this code, the same jurisdiction that our courts had always exercised on appeal, that is to say, to consider the whole record on the merits, and to give final judgment according to the merits. Accordingly it was provided in Section 330:

"Upon an appeal from a judgment or order the Appellate Court may reverse, affirm or modify the judgment or order appealed from in the respect mentioned in the Notice of Appeal, and may *if necessary or proper* order a new trial."

Then the question arose, when is it necessary or proper to order a new trial? In *Astor v. L'Amoreux*[1] the New York Superior Court held that under this section it had the right to render final judgment upon the appeal. But the Court of Appeals reversed this reasonable judgment and held, notwithstanding the express language of the Code, that the Superior Court had no power to do this. Accordingly a new trial was ordered.[2] The progressive lawyers, however, continued to claim that the appellate court had power to render final judgment in equity cases. But again the Court of Appeals, which from the beginning showed little sympathy with the new Code, overruled the contention, and held in *Griffin* v. *Marquardt*[3] that final judgment should be rendered only in cases "where it is entirely plain, either from the pleadings or from the very nature of the controversy, that the party against whom the reversal is pronounced cannot prevail in the suit."

The effect of this decision has been prejudicial to the interests of justice. In a recent decision of the Court of Appeals, *Walters* v. *Syracuse Rapid Transit Co.*,[4] the Court said:

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[1] (1851) 4 Sandf. 524.
[2] (1853) 8 N. Y. 107.
[3] (1858) 17 N. Y. 28, 33.
[4] (1904) 178 N. Y. 50, 53.

"Moreover, it frequently happens that cases appear and reappear in this court, after three or four trials, where the plaintiff on every trial has changed his testimony in order to meet the varying fortunes of the case upon appeal. It often happens that his testimony upon the second trial is directly contrary to his testimony on the first trial, and, when it is apparent that it was done to meet the decision on appeal the temptation to hold that the second story was false is almost irresistible. Yet, in just such cases this court has held that the changes and contradictions in the plaintiff's testimony, the motives for the same, and the truth of the last version, is a matter for the consideration of the jury."

Another recent case, that of *Springer* v. *Westcott*,[1] illustrates the evils to which this rule laid down in the Astor case has given rise. Here the litigation lasted ten years. There were four appeals in the Supreme Court and four trials. The final recovery was for the full amount of the claim, which was nine hundred dollars, the value of the contents of a trunk. Obviously the expense of the litigation was much more than the value of the sum in controversy.

If the object of jurisprudence is to defeat the peaceable recovery of just claims the system thus administered has worked admirably. But if its object be to promote the peaceable adjustment of differences between man and man it is, to put it mildly, not a brilliant success.

At a recent meeting of the New York Bar Association the attention of the Association was called to the amendment which was suggested by President Roosevelt's Annual Message to Congress, and which was selected for consideration at the joint meeting of the Executive and Law Reform Committee, namely:

"No judgment shall be set aside or new trial granted in any case, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure unless, in the opinion of the court to which the application is made, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice."

Professor Huffcut, Dean of Cornell University Law School, read an admirable paper in support of this proposed amendment. The lawyers who opposed it did not agree as to their reasons. One of them said that under Section 1003 of the Code it was unnecessary. Another said that it was revolutionary. Both these criticisms cannot be just. In point of fact neither is. Under

[1] (1901) 166 N. Y. 117.

Section 1003 of the Code, an error of the trial judge "may in the discretion of the court which reviews it be disregarded, if that court is of opinion that substantial justice does not require that a new trial should be granted." No doubt this section if it had been liberally construed by the appellate courts might have been effective to accomplish the result intended. But unfortunately it has not, and there is need for further legislation on the subject. The amendment suggested by the President is the same which was suggested by Judge Amidon of the U. S. District Court for the District of Dakota, at a meeting of the Minnesota Bar Association, which has been published in the proceedings of that Association, and in *The Outlook* for July 14, 1906. It expresses substantially the rule which now prevails in England and in some of the States of the Union, notably the State of New Hampshire. (See Proceedings New Hampshire Bar Association, 1906; Address by Hon. Samuel C. Eastman.)

The most powerful argument for its adoption is that there is no magic in a second trial. The evidence on the first is certainly given at a date nearer to the actual occurrence than that on the second can be. It is less apt to be biased by a knowledge of what finally appears to be the turning point in the case. Again it often happens that witnesses die or leave the jurisdiction in the meantime. In no respect can it be said that the interest of justice is promoted by attaching such special importance to an actual retrial of the case. Far better would it be for the litigants, and in the long run for the lawyers, to have the appellate courts render final judgment upon the evidence presented by the appeal book.

A curious instance of the technical and narrow construction which courts in New York incline to put even upon constitutional provisions relating to practice is to be found in the case of *Williamson* v. *Randolph*.[1] In this case Judge Clark had decided an action, tried before him without a jury, and had filed an opinion stating the grounds of his decision. Before the decision was signed or judgment entered, he was designated a Justice of the Appellate Division. Section 2 of Article 6 of the Constitution of New York provides that no Justice of the Appellate Division shall exercise any of the powers of the Justice of a Supreme Court other than those of a Justice out of court, and those appertaining to the Appellate Division or to the hearing and decision of motions submitted by consent of counsel. The Court held that this debarred him from authenticating by his signature a decision

[1] (1906) 111 App. Div. 539.

that he had made before his designation as a Justice of the Appellate Division. It would seem that the old practice of entering a judgment *nunc pro tunc* when one of the parties has died after the argument and before a decision, might well have been resorted to; or that it might well have been held that the mere manual signature of a decision in a cause already decided was the power of a Justice out of court.

Having thus held that Judge Clarke could not sign the decision, the question arose, what should be done with the case? The evidence had all been taken in open court as in cases at law. Section 3 of Article 6 of the New York Constitution provides that "the testimony in equity cases shall be taken in like manner as in cases at law." The object of this provision was to prevent the taking of testimony in equity cases before a Master in the manner in which testimony was originally taken in Chancery. It would seem that the court might well have held that as the testimony had been taken in open court before a judge the Constitution did not prevent its standing as testimony in the case. However the Court again applied a strict construction, and held that the cause must be tried *de novo*.

Another instance of the same disposition to dispose of appeals on technical grounds is to be found in *Ceballos* v. *Munson Steamship Line*.[1] In this case it was held that the Appellate Division could not review questions of fact upon appeal from an order denying a new trial, for the reason that there was no certificate in the case showing that it contained all the evidence.[2] This ruling would seem to amount to a judicial repeal of the second sentence of Section 997 of the Code. That sentence is as follows:

"The case must contain so much of the evidence and other proceedings upon the trial as is material to the questions to be raised thereby."

No other evidence should be inserted. To say that the Appellate Division will not review on the facts, unless the case on appeal contains *all* the evidence, is an absolute violation of the right of the defeated party to review under this section of the Code.

The decision would also seem to be an attempt to overrule the Court of Appeals in *Rosenstein* v. *Fox*.[3]

Attention is especially called to these two recent decisions because they seem to indicate a tendency on the part of appellate

[1] (1906) 112 App Div. 352.

[2] An appeal to the Court of Appeals was taken from this judgment, but the controversy has been settled and the appeal withdrawn.

[3] (1896) 150 N. Y. 354.

courts in the State of New York to render judgment upon technical grounds. Legislation of the character which has been considered in this article may do something to correct this tendency. But after all the best corrective is to be found in the development of a higher professional standard among members of the bar.

A lawyer whose first thought is to win his case on a technicality and not on the merits may be a sharp attorney, but will never be a first rate lawyer. In every other profession clever tricks are discredited. They ought to be in ours. The machinery of the courts should be so constructed and administered as to make their success impossible, and to do justice to every litigant according to the merits of his cause. After all, lawyers are made for clients —not clients for lawyers.

EVERETT P. WHEELER.

NEW YORK.